

# **CUMULATIVE IMPACT ANALYSIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT**

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## **1. Regulations**

- a. N.E.P.A.'s definition of cumulative impact is contained in 40 C.F.R. § 1508.7 Cumulative impact.
  - i. "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

## **2. Basic Principles**

- a. Scoping vs. Adequacy
  - i. Scoping Challenges
    - 1. Plaintiffs often claim that the scope of the cumulative impact analysis is too narrow and leaves out important cumulative impacts.
  - ii. Adequacy Challenges
    - 1. Plaintiffs also often claim that the cumulative impact analysis does not adequately address in detail the cumulative effects it does mention.
  - iii. In general, courts have been reluctant to hold an EA/EIS deficient based on the inadequacy of its analysis alone as compared to scoping reasons, unless the document is obviously conclusory and lacking in analysis.
- b. Relationship to Segmentation Cases

- i. Cases challenging the cumulative effects analysis of an EIS/EA are similar to cases litigating the issue of segmentation; however, these are two separate issues.

- 1. Segmentation cases

- a. These cases address when an agency is required to prepare a single comprehensive EIS encompassing multiple actions or projects, in order for the total environmental impact of these actions to be addressed together.

- 2. Cumulative impact cases

- a. These cases involve the issue of when an EIS/EA prepared for a single project must also address the cumulative impacts of other proposed or reasonably foreseeable projects.
  - ii. Courts may conclude that a comprehensive EIS encompassing several projects is not required, yet still hold that the EIS for the single project inadequate for failing to address cumulative impacts of other projects.

- 3. Do's and Don'ts

- a. Good Faith Effort vs. Conclusory Documentation

- i. For an EA/EIS to be adequate, the court must be satisfied that the document takes a “hard look” at the environmental consequences of cumulative effects, rather than making only conclusory assertions.

- 1. Examples:

- a. In *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998), the court held an EIS for a timber sale inadequate because it contained only “general statements about ‘possible’ effects and ‘some risk’” rather than the required analysis.
        - b. In *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988), the court held an EIS for an offshore oil project inadequate because it contained only “conclusory remarks, statements that do not equip a decisionmaker to make an informed decision.”

- b. Contrary agency opinion

- i. Courts have held EAs/EIS's to be inadequate when the agency defines the scope of the cumulative effects analysis contrary to the recommendation of its own scientists.

- 1. Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002)

- a. The court held that an EIS for a timber sale was inadequate where it addressed cumulative impacts on animal species within a "home range" area after the agency's scientists had concluded that these cumulative impacts should be addressed at a larger landscape scale instead.

- c. Incorporating prior reports

- i. Agencies may reference prior reports such as programmatic EIS's or other studies in an EA/EIS to satisfy the requirement of cumulative effects analysis.

- 1. Conservation Law Found. v. Federal Highway Admin., 24 F.3d 1465 (1st Cir. 1994)

- a. The court held that an EIS for a highway connector construction project was adequate where it referenced to a previous EIS developed for the entire highway corridor project for cumulative effects analysis.

- ii. However, these prior reports referenced must still be examined by the court and found adequate in their analysis of cumulative effects.

- 1. Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800 (9<sup>th</sup> Cir. 1999)

- a. The court held that an EIS for a land exchange was inadequate where it referenced another EIS, because the court found that the referenced EIS still did not contain sufficient cumulative effects analysis.

- d. Programmatic EIS's

- i. The requirement of addressing cumulative impacts is lessened at the level of a programmatic EIS.

- 1. Resources Ltd., Inc. v. Robertson, 35 F.3d 1300 (9th Cir. 1993)

- a. The court held that cumulative impacts of non-federal actions need not be analyzed in a programmatic EIS, as

long as they are addressed later in EIS's for specific project sites.

e. Beneficial Actions

- i. Some courts have held that when an action is beneficial, an EA/EIS need not address the cumulative effects of other actions which are harmful.

1. Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121 (D.D.C. 2001)

- a. The court held that an EIS for a resource management plan affecting endangered pronghorns was adequate although it did not discuss cumulative impacts because the plan would result in benefit to the pronghorns.

4. Cases Challenging the Scope of Cumulative Impacts Analysis

a. Scoping Tests

- i. 9<sup>th</sup> Circuit – Reasonable Foreseeability

1. The 9<sup>th</sup> circuit has held that “reasonably foreseeable” actions which may have cumulative impacts must be addressed in an EA/EIS.

- a. Native Ecosystems Council v. Dombeck, 304 F.3d 866 (9th Cir. 2002)

- i. The court held that an EA for a proposed amendment to road density standards at a timber sale site in a National Forest was insufficient where it failed to consider the cumulative impacts of all other “reasonably foreseeable” future road density amendments for other sites in the National Forest.

- ii. 10<sup>th</sup> Circuit – Independent Utility

1. The 10<sup>th</sup> circuit uses an independent utility test to determine if actions must be addressed in an EA/EIS.

- a. If the actions are “so interdependent that it would be unwise or irrational to complete one without the other” then cumulative impacts must be addressed.

2. Southern Utah Wilderness Alliance v. Norton, 277 F. Supp.2d 1169 (D. Utah 2003)

- a. The court held that an EA for an oil and gas exploration project (the Veritas project) need not analyze the cumulative impacts of other oil and gas projects in the area because the projects were not interdependent. The court concluded that the projects were not interdependent because commitment to the Veritas project was not necessarily a commitment to the other projects, the other projects could proceed without the Veritas project, and any of the projects could be abandoned without detracting from the Veritas project's purpose.
- b. Agency discretion
  - i. Cases addressing scoping issues often cite the Supreme Court case *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) for the proposition that an agency has discretion in determining the scope of cumulative impact analysis.
    1. The *Kleppe* court stated that that the determination of the extent and effect of cumulative impacts on resources, "and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies."
- c. Types of Scoping Cases
  - i. Nonadjacent similar action
    1. *Grand Canyon Trust v. Federal Aviation Admin.*, 290 F.3d 339 (D.C. Cir. 2002)
      - a. The court held that an EA for a proposed replacement airport near a national park was not sufficient where it only addressed the incremental noise impacts of the new airport versus the existing airport, and did not address the cumulative noise impacts of all air traffic in the area. The court concluded that the EA must address the total impacts of all flights near or over the park besides those that originate at the replacement airport, as well as additional noise from planned expansions of other regional airports, and air tours over the park.
  - ii. Nonadjacent dissimilar action
    1. *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239 (M.D. Pa. 1992)

- a. The court held that an EA for relocation of a national guard base to an airport was adequate despite not considering cumulative effects of other projects in the airport area such as road construction. The court reasoned that the road construction was not a major development requiring extensive analysis of cumulative effects.

iii. Same area, different projects

1. Westside Prop. Owners v. Schlesinger, 597 F.2d 1214 (9th Cir. 1979)

- a. The court held that an EIS for the decision to locate F-15s at an air force base need not address the cumulative effects of on-going operations at the base. The court reasoned that since there was no significant increase in operations causing a significant increase in pollution, there was no need to address cumulative effects because the EIS was not meant to be an evaluation of maintaining the base overall.

iv. Future change in project

1. Utahns for Better Transp. v. United States Dep't of Transp., 305 F.3d 1152 (10th Cir. 2002)

- a. The court held that an EIS for a 4-lane planned highway project was adequate despite its failure to address the cumulative impacts of a later possible expansion of the highway to six lanes, because this expansion was not reasonably foreseeable.

v. Project effects an adjacent area

1. Earth Island Inst. v. United States Forest Serv., 351 F.3d 1291 (9th Cir. 2003)

- a. The court held that an EIS for a timber sale was inadequate where it failed to consider the cumulative impacts of the sale on spotted owl species in a neighboring national forest. The court stated that cumulative impacts on the owl species must be addressed because it depended on the national forest in question for its home range area.

vi. Timing issue

1. Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003)

- a. The court held that an EIS for a road easement through national forest land with an endangered grizzly bear population was adequate in using a three year analysis period for cumulative effects. The court concluded that this time period was appropriate because regulations affecting the project were set for a three year period.

5. Cases Challenging Adequacy of Cumulative Impact Analysis

a. Fact Based Analysis

- i. Determination of the adequacy of the cumulative impacts analysis contained in an EA/EIS turns on a fact-based analysis of the document.

b. Rule of Reason Test

- i. Courts use the “rule of reason” test, determining if the discussion of cumulative impacts is “reasonably thorough” and would allow a decisionmaker to make an informed decision.
- ii. This “rule of reason” test is the same test used generally to determine if any section of an EIS/EA is adequate.

c. Other Requirements

- i. The 9<sup>th</sup> circuit has also held that an EA/EIS must “catalogue adequately past projects in the area” to be held adequate, according to *City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997).
- ii. The 5<sup>th</sup> circuit has held that a meaningful cumulative effects study must include the following factors according to *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985):
  - 1. the area in which the effects of the proposed project will be felt
  - 2. the impacts that are expected in that area from the proposed project
  - 3. other actions – past, proposed and reasonably foreseeable – that have had or are expected to have impacts in the same area
  - 4. the impacts or expected impacts from these or other actions and

5. the overall impact that can be expected if the individual impacts are allowed to accumulate.

d. Cases Approving Cumulative Impact Analysis

- i. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346 (9th Cir. 1994)

1. The court held that an EIS for proposed herbicide use by the Forest Service was adequate where it addressed cumulative effects from exposure to herbicides from other sources and the discussion was “reasonably thorough.” The court concluded that the EIS did anticipate other exposures to herbicides and reasonably addressed cumulative effects.

- ii. Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977)

1. The court held that an EIS for a uranium mining agreement was adequate where it mentioned and discussed in detail the cumulative impacts of other resource projects in the area. The court emphasized that the EIS mentioned and discussed foreseeable impacts in detail, including location, timing and nature of other resource projects in the area.

e. Cases Disapproving Cumulative Impact Analysis

- i. Friends of the Earth, Inc. v. United States Army Corps of Eng'rs, 109 F. Supp.2d 30 (D.D.C. 2000)

1. The court held that an EA for a casino barge was inadequate where it contained only conclusory statements rather than analysis of cumulative effects of other casinos and development along the same coast. The court concluded that the EIS’s recitation of the history of development along the coast and statement that cumulative impacts are minimal was not sufficient to equip the decisionmaker to make an informed decision.\

- ii. Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800 (9th Cir. 1999) (land exchange)

1. The court held that an EIS for a land exchange was inadequate where it did not provided detailed analysis of the cumulative impacts of timber harvesting and other impacts on resources of all land exchanges in the forest to a lumber company. The court found the cumulative impacts analysis to consist of broad, general statements devoid of reasoned conclusions, which were not in



sufficient detail to be useful to the decisionmaker.

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## 6. Proposed Actions

### a. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

- i. Kleppe held that only “proposed actions” must be considered in an impact statement, in a case addressing the issue of when a programmatic impact statement had to be prepared on a group of related actions.
- ii. However, Kleppe did not address the question of what actions must be considered in an impact statement’s discussion of cumulative impacts.

### b. Differing interpretations of Kleppe

- i. Some cases after Kleppe have interpreted the case to mean that only proposed actions must be considered in a discussion of cumulative impacts.

#### 1. Hart & Miller Islands Area Env'tl. Group, Inc. v. United States Army Corps of Eng'rs, 505 F. Supp. 732 (D. Md. 1980).

- a. The court held that an impact statement for a diked dredged soil disposal facility in Chesapeake Bay need not consider the cumulative impact of the dredging of an access channel and the deepening of a harbor that were related to the facility but not yet approved. The court believed that Kleppe did not require consideration of cumulative impacts of speculative proposals, and quoted language from Kleppe indicating that an agency could approve a project covered by an impact statement and prepare an impact statement on related actions later when they were proposed.
- ii. However, other cases still require actions which are not yet proposals to be considered in a discussion of cumulative impacts

#### 1. Fritiofson v. Alexander

- a. The court held that an environmental assessment for a housing development and canal plan in Galveston Island, TX must consider cumulative effects of other developments on the island even though some of them were not yet proposals requiring an impact statement.

- b. Although Kleppe required impact statement only for actions that had become "proposals," the court held Kleppe does not apply when an agency assesses the environmental significance of an action to determine whether an impact statement should be prepared. In this situation, as the Council for Environmental Quality regulations indicate, the impact of other actions must be considered even though they have not yet reached the proposal stage.

7. "Connected" and "cumulative" actions

- a. Actions which are "connected" or "cumulative" are required to be considered together in a single impact statement.
- b. Council of Environmental Quality Regulations – 40 C.F.R. § 1508.25
  - i. To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:
  - ii. Connected actions, which means they are closely related and should therefore be discussed in the same impact statement.
    - 1. Actions are connected if they:
      - a. (i) Automatically trigger other actions which may require environmental impact statements.
      - b. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
      - c. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
  - iii. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
- c. Relationship to cumulative impacts
  - i. Cumulative impact questions have been considered by the courts in the context of these regulations defining the required "scope" of an impact statement.
  - ii. However, even if actions are not found to be "connected" or "cumulative" requiring consideration together in a single impact statement, the court may still hold that cumulative impacts of the actions must be addressed.

1. Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002) (road density amendments for timber sales not “connected” or “cumulative” actions, but cumulative effects must still be addressed)
- d. Determining if actions are “connected” or “cumulative”
- i. Courts often use the language of the regulations to determine if actions meet the definition to qualify as “connected” or “cumulative actions”
  - ii. Independent utility
    1. In addition to using the CEQ regulation’s definition of “connected” action, the Ninth Circuit also uses an independent utility test to determine if actions are “connected.”
      - a. The court will look at if the actions have a “dependency such that it would be irrational, or at least unwise” to undertake one action without the other.
        - i. Save Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988) (road building and logging are connected actions because they have no independent utility)
      - b. This test is different from the Ninth Circuit test for whether cumulative effects must be considered (the reasonable foreseeability test), but is similar to the Tenth Circuit test for whether cumulative effects must be considered.
- e. Example
- i. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).
    1. The court held that a road and a timber sale met the definitions of “connected” and “cumulative” actions, requiring cumulative effects of both to be addressed together in a single impact statement. The actions were “connected” because they did not have independent utility; the timber sales could not proceed without the road and the road would not be built if timber sales were not contemplated. The court also found the actions to be “cumulative” because together they would have significant cumulative impacts, and rejected the argument that the timber sales were too uncertain to require addressing because they were certain enough for the road to be planned.

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